Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 87-119
	)	
Breeze Broadcasting Company, Ltd.	)	File No. BPH-840503IC
	)	
Maranatha Broadcasting Company, Inc.	)	File No. BPH-850712ME
	)	
J. McCarthy Miller	)	File No. BPH-850712NT
	)	
For Construction Permit for New FM Station, Channel 291A, Gulf Breeze, Florida	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1998 **Released:** November 6, 1998

By the Commission:

1. This Memorandum Opinion and Order dismisses a Joint Petition for Approval of Settlement, filed December 29, 1997, by Breeze Broadcasting Company (Breeze) and Maranatha Broadcasting Company, Inc. (Maranatha).[1] We find that a third applicant, J. McCarthy Miller, who had been disqualified by the Commission's former Review Board (Board), and on whose disqualification the settlement is contingent, is in fact qualified to be a licensee. Accordingly, the settlement fails to resolve this frozen comparative proceeding and will be rejected.

I. BACKGROUND

2. Breeze, Maranatha, and Miller are the remaining applicants in this comparative proceeding for a new FM radio station at Gulf Breeze, Florida. The Board granted Breeze's application and denied the others. Breeze Broadcasting Company, Ltd., 8 FCC Rcd 5578 (Rev. Bd. 1993); 8 FCC Rcd 1835 (Rev. Bd. 1993). The Board found that Miller had failed to demonstrate the requisite financial qualifications to be a Commission licensee. As between Breeze and Maranatha, the Board found that Breeze was entitled to a decisionally significant preference for integration of ownership into management. 8 FCC Rcd at 5578 ¶ 4, 1840 ¶ 25.

[1] Also before the Commission are: (1) a Supplement to Joint Petition for Approval of Settlement Agreement, filed January 12, 1998, by Breeze and Maranatha; (2) the Mass Media Bureau's Consolidated Comments in Support of Joint Petition for Approval of Settlement Agreement and Motion for Leave to Amend, filed January 13, 1998; (3) an Opposition to Joint Petition for Approval of Settlement Agreement, filed January 13, 1998, by Miller; and (4) a Reply to Opposition to Joint Petition for Approval of Settlement Agreement, filed February 12, 1998, by Breeze and Maranatha.

3. On February 25, 1994, this case became subject to the freeze on comparative proceedings resulting from the action of the United States Court of Appeals for the District of Columbia Circuit in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), which held that the integration criterion was arbitrary and capricious and therefore unlawful. See Public Notice, 9 FCC Rcd 1055 (1994). The Commission modified its freeze policy to provide that, if the parties to a proceeding reached a settlement that was contingent upon the resolution of specific basic qualifying issues, such issues would be adjudicated and the Commission would rule on the settlement. Public Notice, 9 FCC Rcd 6689 (1994).

4. The parties, other than Miller, now propose such a settlement that would resolve this proceeding if Miller's disqualification is upheld.

II. DISCUSSION

A. Settlement Agreement

5. Under the terms of the settlement, Maranatha's application would be dismissed, and an entity called Scenic Broadcasting (Scenic) would be substituted for Breeze, whose application would then be granted. Scenic would be owned in equal shares by Breeze and by MBC Southeast, Inc., an entity with the same principals as Maranatha. The principals of both Breeze and Maranatha propose to participate in the operation of the station, as owned by Scenic. The Mass Media Bureau supports approval of the settlement, assuming that the denial of Miller's application is upheld.

6. Miller opposes the settlement on several grounds. Miller contends that the replacement of Breeze by Scenic, which would be 50 percent owned by Maranatha's principals constitutes a major change in ownership under 47 C.F.R. § 73.3573(b). According to Miller, the rule requires that Breeze's application, as amended, must be assigned a new file number and returned to the processing line. Miller also contends that the proposed merger cannot be approved because the merged entity, Scenic, has not certified its financial qualifications.

7. Additionally, Miller asserts that the proposed settlement cannot be approved because unresolved questions exist as to the qualifications of Breeze. Miller observes that it filed a motion to enlarge issues against Breeze arguing that Breeze is financially unqualified. The ALJ denied the motion and the Board affirmed. Breeze Broadcasting Company, Ltd., FCC 91M-1711 (May 24, 1991), aff'd, 8 FCC Rcd 1835, 1840 ¶ 26 (1993). Miller suggests that the Commission might conduct an auction or other novel procedure to award the Gulf Breeze authorization and that approval of the settlement is therefore unnecessary.

8. We find no merit to Miller's objections to the settlement. The rule cited by Miller, 47 C.F.R. § 73.3573(b), does not apply to post-designation amendments, which are generally governed by the good cause requirements of 47 C.F.R. § 73.3522(b). See Las Americas Communications, Inc., 5 FCC Rcd 1634, 1637 ¶ 22 (1990), and cases cited therein. In this case, the requisite good cause demonstration is subsumed within the showing prescribed by 47 C.F.R. § 73.3525(a) in connection with settlements, including those involving the "withdrawal or amendment of an application." Consequently, a finding that the settlement comports with the provisions of 47 C.F.R. § 73.3525(a) and would serve the public interest is all that is required here. Similarly, Miller has shown no basis to require any specific demonstration of financial qualifications by an entity formed through the merger of two financially qualified applicants. Additionally, we see no basis to deny the proposed settlement in order to institute an auction or other novel procedure in this proceeding. Section 3002(a)(3) of the Balanced Budget Act of 1997, Pub. L. No. 105-33 111 Stat. 251 (1997), provides that, with respect to applicants with competing applications filed prior to July 1, 1997, the Commission shall "waive any provisions of its regulations necessary to permit

such persons to enter into an agreement to procure the removal of a conflict between their applications" during a 180-day period. This provision discloses a congressional intent to permit parties to a proceeding such as this one to enter into settlements, despite the fact that the Commission was given the authority to resolve proceedings by auction.

9. As to Breeze's financial qualifications, we agree with the ALJ and the Board that Miller has not raised a substantial and material question of fact with regard to Breeze's qualifications. Miller's motion, which was filed after similar issues were designated against him (see below), alleged that, during the pendency of this proceeding, Breeze's principals also had interests in other pending applications that detracted from their ability to meet their financial commitments in this proceeding.[2]

10. Most of these interests involved Breeze's two 25 percent limited partners, Houston and Voncile Pearce. From March 1987 until July 1990 Voncile Pearce was an individual applicant for an FM station in Florence, Alabama. This period overlapped with a time interval (September 1986 to November 1988) in which she was also a 20 percent limited partner in an applicant for an FM station in Oxford, Alabama. Additionally, for one year (July 1987 to July 1988) Houston Pearce was an individual applicant for an FM station in Dothan, Alabama. He held a 50 percent interest in a station in Cordoba, Alabama that was granted in December 1986 and went on the air in June 1987. Both the Dothan and Florence applications were to be financed by $275,000 loans that were personally guaranteed by the Pearces. The Pearces claim a net worth of more than $2 million and also claim that bank commitment letters were issued for all of the stations. All of the applications except the Cordoba station were eventually dismissed.[3] The interests held by the Pearces do not constitute a large or unusual number of outside interests that might raise a question as to the applicant's financial qualifications. See Certification of Financial Qualifications, 2 FCC Rcd 2122 (1987); George Edward Gunter, 104 FCC 2d 1363, 1366-67 ¶¶ 7-8 (Rev. Bd. 1986). The facts do not otherwise raise a substantial question that Breeze would be unable to meet its financial commitments.

11. Another of Breeze's principals, 25 percent general partner William Phillips, was also a 33 percent limited partner in an applicant for a station in Northport, Alabama. Subsequently, he was also a 49 percent shareholder in the proposed assignee of an FM station in Chickasaw, Alabama, for which he was the cosignor of a note for $361,804. As above, the extent of Phillips' outside interests does not raise a substantial and material question of fact as Breeze's financial qualifications.

B. Miller's Financial Qualifications

12. As discussed above, we find no merit to Miller's objections to the settlement. Nevertheless, before we can approve the settlement, we must also address a pending application for review relating to Miller's qualifications to be a licensee.[4] The Board found that Miller failed to demonstrate that at the time

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[2] See (1) Motion to Enlarge Issues, filed March 29, 1991, by Miller; (2) Opposition to Motion to Enlarge Issues, filed April 23, 1991, by Breeze; (3) Reply to Opposition to Motion to Enlarge Issues, filed May 3, 1991, by Miller; and (4) Supplement to Motion to Enlarge Issues, filed May 30, 1991, by Miller.

[3] Following the dismissal of all of the listed applications, Houston Pearce became the 50 percent shareholder in an applicant/permittee for an FM station in Glencoe, Alabama.

[4] Application for Review, filed September 20, 1993. Also pending are: (1) an Opposition to J. McCarthy Miller's Application for Review, filed October 5, 1993, by Breeze and (2) an Opposition to Applications for Review, filed October 5, 1993, by Maranatha.

he filed his application he had sufficient available funds to meet the costs associated with this application and other pending applications in which he had an interest. Miller estimated the cost of construction and initial operation for the Gulf Breeze station to be $126,000, which he proposed to meet from his personal assets. The Board accepted the claim that Miller's net worth of $3,308,000 including $576,000 in net liquid assets would be sufficient to cover the costs of the Gulf Breeze station as well as two other FM stations in which Miller had an interest. 8 FCC Rcd 1836 ¶¶ 5-6. However, the Board found that Miller also had interests in numerous low power television (LPTV), multipoint distribution service (MDS), and cellular radio applications.

13. These applications were filed by two companies that Miller owned in connection with J.R. Miller (no relation). Miller held a 51 percent interest in M&M Communications, Inc., which had pending applications for 72 LPTV stations and 46 MDS stations. The Board estimated the costs of construction and initial operation for the LPTV stations to be $8,460,000 and for the MDS stations to be $7,958,000. Miller also held a 50 percent interest in Miller Communications, Inc., which had applications for 30 cellular radio systems. The Board estimated the cost of the systems to be $60 million. 8 FCC Rcd at 1836 ¶¶ 6-7.

14. According to the Board, Miller explained that these various LPTV, MDS, and cellular applications did not involve any commitment of his personal resources and, thus, the approximately $76 million in estimated costs did not detract from his qualifications for the Gulf Breeze FM station. 8 FCC Rcd at 1836 ¶ 8. According to Miller, J.R. Miller had orally agreed to provide all funding for the LPTV stations. The MDS stations would assertedly be funded by the loans from the Barnett Bank of Pensacola, Florida, or by J.R. Miller, if necessary. Miller indicated that the cellular stations would be funded by various bank loans. Id. Miller also noted that the Commission had eliminated the requirement that applicants make a financial showing in connection with LPTV applications. Id. at 1837 ¶ 11. He finally observed that the various authorizations applied for were to be awarded by lottery and that it was therefore unlikely that more than a fraction of the applications would ever be granted. Id.

15. The Board held, citing Texas Communications Limited Partnership, 5 FCC Rcd 5876, 5878 ¶ 11 (Rev. Bd. 1990), that Commission policy required Miller to demonstrate the availability of funds to meet the costs of construction and initial operation for all of the pending applications and that Miller failed to do so. The Board found that J.R. Miller had never agreed to provide funding for all of the pending proposals. The Board further found that neither Miller nor J.R. Miller had ever calculated the total cost of all of the facilities, had not submitted bank commitment letters covering all the facilities, and had committed themselves to build only a few facilities that they would choose. The Board inferred that Miller would be liable for the costs of the LPTV, MDS, and cellular stations as a shareholder of the two corporate applicants and because he stated in at least one LPTV application that the station would be funded by his personal resources. 8 FCC Rcd at 1837 ¶ 13. The Board found no precedent for taking into account the probability that the applications would or would not be granted. Id. at 1837 ¶ 15.

16. In his application for review, Miller asserts that the Board erred in finding him financially unqualified. He denies that he was personally obligated to fund the LPTV, MDS, or cellular facilities and maintains that the fact that he was a shareholder of the two corporate applicants is no reason to impute such an obligation to him. He urges that no costs should be imputed to him based on the LPTV applications, because the Commission eliminated the need for a showing of financial qualifications in that service. Moreover, he claims that J.R. Miller was committed to and had the means to fund the number of LPTV stations that likely would have been awarded in lotteries. Miller further claims that the MDS and cellular applications were supported by bank letters as to which he would have no personal liability.

17. We reverse the Board and conclude that Miller has demonstrated that he is financially qualified to construct and operate the Gulf Breeze FM station. In reaching this conclusion, we wish to

clarify the applicable legal standard. As the Board correctly held, the pendency of Miller's numerous LPTV, MDS, and cellular applications at the time he certified his financial qualifications are potentially relevant to the inquiry here. We do not agree, however, with the unqualified assertion that Miller has the burden of showing in this proceeding that he is financially qualified with respect to all of his pending applications. No issue has been specified as to the financial qualifications of the other applicants of which Miller is a principal and thus all questions concerning the grantability of those other pending applications are beyond the scope of this proceeding. His involvement with the other applications is relevant only to the extent that it could have a potential impact on the availability of the funds relied on here. Thus, in Playa de Sol Broadcasters, 8 FCC Rcd 7027, 7028 ¶ 11 (Rev. Bd. 1993), the Board, in designating a financial issue, rejected an applicant's claim that the bank loan relied on in that proceeding (Mecca, California) was "distinct" and "independent" from financial arrangements supporting another pending application (Montecito, California), because it found substantial and material questions of fact as to whether the personal commitments supporting the Montecito financing would adversely impact the bank's willingness to make the loan relied on in the Mecca proceeding.[5] By contrast, in this case, Miller relies on his personal assets to finance the construction and initial operation of the proposed station and contends that the other pending applications would be financed independently either by J.R. Miller or by bank loans and would not require the use of his personal assets.

18. We find that the Board's decision and the ALJ's supplemental initial decision (Breeze Broadcasting Company, Ltd., 7 FCC Rcd 1653 (S.I.D. 1992), do not properly analyze the relevance of Miller's non-broadcast applications because they suggest that Miller has an unqualified burden of demonstrating his financial qualifications with respect to those applications in order to show he is financially qualified with respect the Gulf Breeze application. We disagree. If Miller arranged his affairs so that his obligations to fund the FM applications were to be satisfied by available resources that he was not obligated to use to fund the various non-broadcast applications, it is irrelevant to this proceeding whether he had the resources to fund the non-broadcast applications. For this reason, we will conduct a de novo review of the record on this issue to determine whether Miller effectively segregated his commitments to the FM and non-broadcast applications and to determine the nature of these obligations.

19. We find that the evidence supports Miller's contention that his commitments to the non-broadcast applications were separate from and did not detract from his financial qualifications here. We reach this conclusion although we do not find that Miller's arrangements to finance the non-broadcast applications were necessarily adequate for that purpose. It is sufficient that they did not conflict with Miller's intent to earmark nis personal resources to finance the FM stations. In this regard, the record supports Miller's contention that his understanding with J.R. Miller relieved him of any obligation to devote his personal resources to the applications in which he and J.R. Miller had a joint interest.

20. We recognize that that understanding does not appear to have been reduced to a formal or binding commitment. The Memorandum of Agreement between Miller and J.R. Miller, executed July 3, 1984 (Breeze Remand Exh. 2) did not contain such a provision. Indeed, the record indicates that draft language that would have committed J.R. Miller to provide funding was deleted from the final version. Jt. Stipulation 1 at 2; Tr. 883-85. Nevertheless, despite the absence of a formal, written agreement to that effect, J.R. Miller confirmed that he and Miller understood that the latter would not be required to provide financing. The record contains a sworn declaration by J.R. Miller (Miller Remand Exh. 1, Att. A), which states:

[5]Ultimately, the Presiding Judge resolved the financial issue in that applicant's favor, finding that the evidence developed after remand confirmed that the Mecca and Montecito proposals were in fact distinct and independent. Playa del Sol Broadcasters, 9 FCC Rcd 4840, 4846 ¶ 51 (S.I.D. 1994).

> I agreed that in the event any of the LPTV applications were granted, I would lend M&M, either directly or through loans secured from third parties, the funds necessary to prosecute the applications, construct and operate the stations. . . . . It was understood that Mr. Miller and his wife would have no personal financing obligation with respect to these stations.

This declaration was sufficient to demonstrate that Miller was not personally obligated to finance the LPTV stations.

21. We also recognize that J.R. Miller was not committed to fund all pending applications or even all applications granted by the Commission. Rather, in written testimony stipulated to by the parties (Jt. Stipulation 1 at 2), he stated:

> [I] expressed a willingness to fund or arrange funding for the construction and operation of the stations if we chose to build them. Our approach would have been to build a few of the stations and see how they did. If they turned out well, I would furnish or obtain more money to build more of them.

Moreover, he specifically testified that he would not have contributed the funds necessary to construct all of the pending LPTV and MDS stations. Jt. Stipulation 1 at 3. The record thus establishes that J.R. Miller would provide financing only for certain stations that he and Miller "chose" and does not establish Miller's financial qualifications with respect to all pending applications.

22. The limitations on J.R. Miller's commitment, however, do not conflict with Miller's intent to set aside his personal resources for the FM applications and segregate them from any obligation to fund the LPTV and MDS applications. The evidence confirms that Miller undertook no obligation to provide funding to the extent that J.R. Miller did not. On the contrary, the evidence indicates that to the extent that J.R. Miller did not provide funding, other applications that might be granted would not be financed out of Miller's personal resources, but rather would not be built at all. Tr. 886-89. We therefore disagree with the analysis of the Board and the ALJ that establishing Miller's financial qualifications is dependent upon the existence of an understanding that J.R. Miller would be able to provide all financing for the LPTV and MDS applications.

23. Nor do we find it troubling that the agreement was not reduced to writing, since it was apparently intended that the agreement was open-ended as to which stations would actually be funded. See Tr. 885-92. Similarly, we find no probative value in a statement in one of Miller's LPTV applications (Breeze Remand Exh. 1, Exh. 1) that: "Cost of construction and operation of the applicant's low power TV facility will be financed from applicant's surplus funds." The application was filed in 1980, before Miller and J.R. Miller entered into their agreement, which supersedes the application as a statement of Miller's intent.

24. Another piece of evidence (Breeze Remand Exh. 7), however, requires closer scrutiny, although it too ultimately proves to be without probative value as to the issue of J.R. Miller's commitment. This exhibit was originally exchanged on February 1, 1990 after a financial issue was added in the hearing concerning Miller's application for an FM station in Orange Beach, Alabama. In the exhibit, which was intended to demonstrate Miller's then-current financial qualifications, Miller stated: "Mr. [J. McCarthy] Miller is also obligated to provide up to 51% of the financing to construct and operate LPTV stations in Little Rock, AK. and Jacksonville, Fla." Id. at 1. The exhibit concluded that

"[assuming] the most costly set of circumstances," Miller's total financial obligations for the three FM applications and two LPTV permits would be $757,260, which would be covered by Miller's then-current liquid assets of over $1.5 million. Id. at 2. The exhibit states that, at the time, Miller had no other significant financial obligations or commitments. Id.

25. On its face, the exhibit seems to contradict Miller's claim in this proceeding that he was not obligated to provide financing for the LPTV (or MDS or cellular) applications based on his agreement with J.R. Miller. At the hearing in this case, Miller was cross-examined as to this seeming inconsistency. Tr. 976-78. His testimony (Tr. 977) that "whether I forgot it [i.e., the agreement with J.R. Miller] or what, I don't know" sheds no light on the question. Nevertheless, the circumstances in which the exhibit was filed makes Miller's nonreliance on his agreement with J.R. Miller less significant. First, although the February 1, 1990 exhibit did not rely on the agreement with J.R. Miller, Miller had previously testified to the existence of the agreement in a November 29, 1989, deposition in the Orange Beach proceeding. Tr. 992-95. That Miller ultimately chose not to rely on the agreement in the Orange Beach exhibit should not, therefore, be construed as an admission that the agreement did not exist. Second, at the time that the exhibit was filed (as well as when the Orange Beach application was filed on December 3, 1987), Miller no longer needed to rely on his understanding with J.R. Miller. By that time, Miller had significantly more resources and fewer outside commitments than when Miller certified his financial qualifications in Gulf Breeze and relied on J.R. Miller to help him meet those outside commitments. By the time the Orange Beach application was filed, Miller no longer had numerous pending LPTV, MDS, or cellular applications, since lotteries involving Miller's applications had already taken place. Miller Remand Exh. 1 at 3; Gulf Breeze Remand Exh. 7 at 1-4. Moreover, the sale of a cellular property had yielded over $1.5 million in proceeds that Miller could use to meet his financial obligations. Miller Remand Exh. 1 at 6; Gulf Breeze Remand Exh. 7 at 4. Thus, the record indicates that, over time, the agreement with J.R. Miller became superfluous as a source of funds, making it unexceptional that Miller did not rely on it in Orange Beach. Indeed, despite the agreement, J.R. Miller was never called upon to furnish funds or arrange for financing. Jt. Stipulation 1 at 2.

26. As noted above, Miller indicated that to the extent funds were not forthcoming from J.R. Miller to build stations, they would be derived from bank loans. The record also substantiates that such loans, rather than Miller's personal assets, would provide any funds that J.R. Miller did not provide personally. Here again, as was the case with the J.R. Miller commitment, the record does not demonstrate the existence of sufficient firm commitments from banks to cover all pending applications. (Miller had not even estimated the total costs associated with the pending applications. Tr. 964.) But here again, these limitations do not implicate Miller's personnel funds, set aside to finance the FM stations. More specifically, the record contains only two bank letters that predate the filing of Miller's Gulf Breeze application. An August 2, 1983 letter from Barnett Bank (Miller Remand Exh. 1, Att. B) states merely that the bank: "has agreed to consider making funds available" for one of Miller's MDS applications. A July 12, 1984 letter from an official of the First American Bank of Pensacola (Id., Att. C, Att. 1) states only that: "I would not anticipate difficulty in arranging financing for the purpose of constructing and operating cellular systems for which Miller Communications, Inc. will be seeking authorization," although the participation of other banks might be necessary. Although these letters do not reflect firm commitments by banks sufficient to cover all applications, they amply substantiate Miller's intent to rely on bank loans and not his personal assets. The terms of the bank letter do not encumber Miller's personal assets.

27. In this regard, we note that these letters (as well as letters executed after the filing of the Gulf Breeze application) indicate that Miller's personnel guarantee might be required for any loans. Indeed, Miller indicated in writing (Breeze Remand Exh. 4) that he was willing to personally guarantee a $2.3 million loan from the Bank of Mobile to finance a cellular system in Binghamton, New York. We find

that the possibility that Miller might be required personally to guarantee loans does not detract from the availability of his personal assets. Although the demands of a Gulf Breeze station on Miller's financial resources might adversely affect the bank's willingness to make such a loan, we know of no precedent for treating such a guaranty provision as a current liability that effectively reduces the amount of liquid assets available for the Gulf Breeze station in the first instance.

C. Conclusion

28. We find that the record confirms that Miller's plans to finance the various pending LPTV, MDS, and cellular applications did not rely on the same resources as his proposal to finance the proposed Gulf Breeze FM station. Miller's actual financial qualifications with respect to these other stations is outside the scope of this proceeding, as is the propriety of his intent to select which stations he might "choose to build." Miller is therefore qualified to be a licensee here. Because the proposed settlement agreement is effectively conditioned on the denial of Miller's application, we dismiss it.[6]

III. ORDERING CLAUSES

29. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed September 20, 1993, by J. McCarthy Miller IS GRANTED, and the Decision of the Review Board, FCC 93R-41 (Aug. 19, 1993) (8 FCC Rcd 5578), and the Memorandum Opinion and order of the Review Board, FCC 93R-8 (March 18, 1993)(8 FCC Rcd 1835) ARE MODIFIED as set forth above.

30. IT IS FURTHER ORDERED, That the Joint Petition for Approval of Settlement Agreement, filed December 29, 1997, by Breeze Broadcasting Company, Ltd. and Maranatha Broadcasting Company, Inc. and the associated Motion for Leave to Amend, filed December 29, 1997 ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[6] If the parties to this proceeding choose to amend the pending settlement agreement within the period before its dismissal becomes final, we would, for the purposes of 47 U.S.C. § 309(l)(3), treat such an amended agreement as having been filed on December 29, 1997. The parties should file any such amended agreement within 30 days after the release date of this proceeding.